No. 96-526

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

STEPHEN JOHNSON,

Petitioner,

vs.

MARYLOU ZSCHACH,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Ohio

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a putative father's right to due process of law is violated when, pursuant to Ohio law, an adoption is finalized due to his conditional consent and failure to file a written objection to the adoption.

2. Whether a putative father's right to due process of law is violated when the probate court enters a final adoption decree without visitation rights because the putative father has given a conditional consent and failed to object to the adoption.

3. Whether a putative father's right to equal protection is violated when he has failed to demonstrate a full commitment to parenthood and a written objection is required.

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APPENDIX

Appendix A — Judgment of the Probate Court of Fairfield County, Ohio Filed August 30, 1993	1a

Respondent Marylou Zschach respectfully requests that this Court deny the Petition for writ of certiorari filed in this action by the putative father, Stephen Johnson, who failed to file a written objection to the adoption.

OPINIONS BELOW

Petitioner Stephen Johnson ("Petitioner") seeks a writ of certiorari to review the decision of the Ohio Supreme Court reversing the Fifth District Court of Appeals. Petitioner's Appendix at 2-33. The Court of Appeals held that Petitioner's conditional consent to the adoption was "tantamount" to a written objection. Pet. App. at 37-42. On June 6, 1996, the Ohio Supreme Court reversed, finding that Petitioner failed to object and thereby failed to demonstrate a full commitment to parenthood. 75 Ohio St. 3d 648, 665 N.E. 2d 1070 (1996); Pet. App. at 2-33. On July 3, 1996 the Ohio Supreme Court denied reconsideration. 76 Ohio St. 3d 1410 (1996); Pet. App. at 1.

STATEMENT OF JURISDICTION

Respondent agrees that this Court has jurisdiction pursuant to 28 U.S.C. § 1257(a) (1996).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner purports to challenge Ohio Revised Code §§ 3107.06 and 3107.07 pursuant to the Fifth Amendment to the Constitution of the United States and the Fourteenth Amendment to the Constitution of the United States. The full text of these statutes and the constitutional provisions are accurately reproduced in Petitioner's Brief at 2-6.

STATEMENT OF THE CASE

Glennoel Zschach (the "child") was born July 24, 1992. She has lived with her adopted mother, Marylou Zschach ("Zschach"), since October 17, 1992 when she was placed with Zschach by the birth mother. The birth mother consented to the adoption. The child is currently in a loving, nurturing home environment.

Petitioner's statement of the case begins with a declaration that is unsupported by the record. Petitioner claims that he is the biological father of the child. Petitioner's Brief at 6. Petitioner has never proven himself to be the biological father of the child. Petitioner is merely a putative father. He was never married to the birth mother and has not attempted to prove his paternity in court.

As putative father, the Petitioner appeared before the probate court on November 23, 1992 and signed a consent to adoption which states,

> CONSENT TO ADOPTION
>
> Stephen Reah Johnson represents that he is qualified to consent to the adoption of [minor child], and the undersigned *hereby consents* to the adoption of the child as proposed in the petition.
>
> This consent is conditioned upon the undersigned father of the minor child being granted visitation rights with the minor child to include at least twenty (20) hours per month in the final decree of adoption. In the event that said decree of adoption does not award visitation rights, this consent shall be null and void.

Pet. App. at 50-51 (emphasis added). Petitioner's consent was drafted by his attorney and he was represented by counsel throughout the proceedings. The birth mother filed a consent to adoption on November 24, 1992 and the probate court approved the placement of the child with Zschach and signed the placement entry the same day.

On December 24, 1992, the probate court entered an interlocutory order of adoption. Pet. App. at 48-49. The interlocutory order found Zschach suitably qualified to care for and rear the child and that the best interests of the child would be promoted by the adoption. Pet. App. at 48. The court noted that "all consents have been filed herein or have been *found unnecessary*." Pet. App. at 48 (emphasis added). In addition, the court granted Johnson twenty hours of visitation per month. Pet. App. at 44.

Approximately six weeks later, on February 11, 1993, the birth mother filed a motion to revoke her consent alleging fraud and undue influence by Zschach. Pursuant to the birth mother's motion to revoke her consent, both parties filed summary judgment motions. On August 30, 1993, the court granted Zschach's motion for summary judgment and denied the birth mother's motion. Respondent's Appendix at 1. In its judgment entry, the Court stated that it "finds no evidence to support the allegations made by Nan Barnebey of fraud, misrepresentation and undue influence." Respondent's Appendix at 1.

Petitioner never demonstrated a full commitment to parenthood. The "facts" Petitioner offers on this issue are inaccurate and unsupported by the record. For example, the facts that he recites regarding his exercise of visitation rights are no more than a quote from his own motion for reconsideration. Pet. Brief at 19-20. His claim that he regularly exercised visitation is also without record support. Pet. Brief at

8. These "facts" were never adjudicated and never the subject of testimony. The fact is, Petitioner did visit Respondent while she had custody of the child, but his purpose was to express affection for the adoptive mother, not to visit the child. Similarly, Petitioner's claim that he consented only because of duress from the birth mother is inaccurate and unsupported by the record. Pet. Brief at 7. Petitioner appeared before the trial court and filed his conditional consent. There is no record evidence that he was subject to duress.

On March 24, 1994 the probate court signed the adoption certificate of the child so that she was legally adopted by Zschach. Pet. App. at 43. On April 21, 1994, the birth mother filed a motion to set aside the entry and notice of appeal of the entry finalizing adoption. Petitioner also appealed.

On November 14, 1994 the Court of Appeals entered an opinion which reversed the adoption order of the probate court. Pet. App. at 37-42. The Court of Appeals based its reversal on its finding that Johnson's conditional consent to adoption "was tantamount to a written objection to the adoption." Pet. App. at 42.

On May 5, 1995 the Ohio Supreme Court granted jurisdiction to hear Ms. Zschach's appeal. The court reversed the ruling of the Court of Appeals on June 6, 1996 finding that the child had been properly adopted and that Petitioner had failed to object and had thereby lost his right to contest the adoption. *In re Adoption of Zschach*, 75 Ohio St. 3d 648, 665 N.E. 2d 1070 (1996); Pet. App. at 2-33. Petitioner and the birth mother filed motions for reconsideration which the Court denied on July 3, 1996. Pet. App. at 1.

REASONS FOR DENYING THE WRIT

Petitioner failed to advance a compelling argument for this Court to grant a writ of certiorari to review the Ohio Supreme Court's decision. Petitioner claims that he was denied due process in the adoption proceeding. The Ohio Supreme Court reviewed that issue and specifically found that Petitioner received due process and that his inaction could not serve to invalidate the adoption under Ohio law. *In re Adoption of Zschach*, 75 Ohio St. 3d at 652-54, 665 N.E. 2d 1070, 1074-75 (1996). This case does not raise an important federal question that must be settled by this Court, but rather involves a proper application of Ohio law by the Ohio Supreme Court. *See* Rules of the Supreme Court of the United States, Rule 10.

Petitioner further argues that he was denied equal protection due to the fact that he was treated differently than the birth mother. Of course, Ohio has sufficient justification for treating a *putative* father, who has not demonstrated a full commitment to parenthood, differently than a custodial birth parent. Petitioner fails to recognize that he is merely a putative father of the adopted child. He never attempted to establish paternity and he never cared for the child in a custodial parental manner.

Petitioner was provided more than adequate opportunity to object to the adoption. Petitioner appeared personally before the trial court and consented to the adoption, albeit conditionally. The Petitioner was granted full opportunity to object to the adoption throughout the course of the proceedings, but he never did so. Accordingly, the Ohio Supreme Court properly applied Ohio law which mandates that a putative father must file a written objection to adoption to establish a right to withhold consent. The issues raised by Petitioner are state law issues and do not warrant review by the United States Supreme Court.

I.

PETITIONER'S CONSENT IS NOT REQUIRED BECAUSE HE IS MERELY A PUTATIVE FATHER WHO FAILED TO FILE A WRITTEN OBJECTION.

The Ohio Supreme Court properly followed the dictates of Ohio law when it ruled that Petitioner's consent was not required. He is the putative father and does not have an absolute right to withhold consent to an adoption. The Ohio Supreme Court was correct in holding that Petitioner's due process interests were adequately protected by Ohio's statutory scheme, that he failed to object and that he received adequate notice to preserve his rights.

A. The Petitioner's Consent Is Not Required.

Petitioner claims that his consent, "was a necessary precondition" to the adoption. Pet. Brief at 12. This simply is not the case. Petitioner's argument is based upon the flawed premise that he is the father of the child. He is not. Petitioner is the putative father and nothing more.

Because Petitioner's paternity has not been established in a judicial proceeding, the necessity of his consent is determined by the statute governing objections by a putative father. *See In re Adoption of Toth*, 33 Ohio App. 3d 265, 515 N.E. 2d 950 (Summit Cty. 1986). Petitioner apparently concedes this point in that his argument is based upon the statutory provisions involving putative fathers.

The Ohio Revised Code provides:

> Unless consent is not required under section 3107.07 of the Revised Code, a

> petition to adopt a minor may be granted only if written consent to the adoption has been executed by all the following:
>
> * * *
>
> (F) Subject to division (B) of section 3107.07 of the Revised Code, the putative father, if he:
>
> * * *
>
> (3) Has signed the birth certificate of the child as an informant as provided in section 3705.09 of the Revised Code.

This statute specifically mandates that its provisions are "[s]ubject to division (B) of section 3107.07 of the Revised Code."

Petitioner misconstrues the Ohio Supreme Court's recent clarification of the relationship of Ohio Revised Code § 3107.06(F) and § 3107.07(B) as they apply to a putative father's attempt to withhold consent for the adoption of an alleged child. The Ohio Supreme Court held that the necessity of obtaining a putative father's consent is not absolute. *In re Adoption of Greer*, 70 Ohio St. 3d 293, 300, 638 N.E. 2d 999 (1994). The requirement of his consent may be excused pursuant to Revised Code § 3107.07 which provides:

> Consent to adoption is *not required* of any of the following:
>
> * * *
>
> (B) The *putative father* of a minor if the

> putative father *fails to file an objection* with the court, the department of human services, or the agency having custody of the minor as provided in division (F)(4) of section 3107.06 of the Revised Code, or files an objection with the court, department, or agency and the court finds, after proper service of notice and hearing, that he is not the father of the minor, or that he has willfully abandoned or failed to care for and support the minor, or abandoned the mother of the minor during her pregnancy and up to the time of her surrender of the minor, or its placement in the home of the petitioner, whichever occurs first.

Ohio Rev. Code Ann. § 3107.07(B) (emphasis added).

In construing the interrelation of the above-quoted statutes, the Ohio Supreme Court held that unless the statutory consent requirement of Revised Code § 3107.06(F)(3) is excused pursuant to Revised Code § 3107.07(B), a putative father who has signed the birth certificate of a child as an informant may have a statutory right to withhold his consent to the adoption of the child, thereby barring the child's adoption by another. *Greer*, 70 Ohio St. 3d at Syllabus ¶ 2. Petitioner's brief is misleading in its contention that a putative father need not comply with § 3107.06(F)(4). The holding in *Greer*, revolved around the court's finding that a father who had signed the birth certificate *was not held to a 30 day limit as provided in § 3107.06(F)(4)*. The putative father still must file a written objection under §3101.07(B).

The Ohio Supreme Court held:

> *To preserve his right* to withhold consent to the child's adoption and avoid a finding that the requirement of his consent shall be excused, a putative father who has signed the birth certificate of a child *must file a written objection* to the adoption with the court, Department of Human Services, or the agency having custody of the child, but that objection need not be filed within thirty days from the earlier of the date of the adoption petition or placement of the child.

Id. at syllabus ¶ 3 (construing Ohio Rev. Code Ann. §§ 3107.06(F)(3) and 3107.07(B)) (emphasis added). A written objection is an essential prerequisite in order for a putative father to preserve his right to contest an adoption.

The Petitioner consented to the adoption. He solely attempted to preserve visitation rights. He did not want full parental rights and obligations. There is a night and day difference between the two concepts.

Petitioner clearly misreads the statutes in arguing that, because he signed the child's birth certificate, he "falls under division (F)(3), and therefore was not subject to R.C. §3107.07(B)." Pet. Brief at 18. This contention flies in the face of the plain language of the statute. Ohio Revised Code §3107.06(F) explicitly states that its provisions are "[s]ubject to division (B) of §3107.07."

Petitioner's argument that he "reasonably relied" upon the representation of the trial court and counsel is not persuasive. Ohio law does not permit open adoptions. Pursuant to Ohio

Revised Code § 3107.15(A)(1) even biological parents lose all parental rights when their child is adopted. Petitioner filed a motion for relief from judgment, through his attorney. His attorney should have been able to inform Petitioner that open adoptions were not the law in Ohio. As the Ohio Supreme Court noted:

> By attempting to preserve twenty hours of visitation rights per month, Johnson was, in effect, attempting to retain parental rights and privileges while agreeing to dispense with the attendant parental obligations and duties. Because the relationship that Johnson attempted to preserve in his conditional consent falls far short of the interest protected under statute we cannot uphold the appellate court's finding.

In re Adoption of Zschach, 75 Ohio St. 3d at 651-652.

B. The Putative Father Has Not Objected to the Adoption and Thus Is Without Standing to Contest the Adoption.

The putative father's failure to file a written objection to the adoption has stripped him of standing to contest the adoption. Petitioner merely submitted to the probate court a consent conditioned upon visitation.

The consent document does not state that without visitation, the putative father objects to the adoption. Rather, the putative father manifested a specific intent to forfeit his parental rights and merely expressed a desire to preserve visitation rights. At the time of the filing of his conditional consent, the putative father was represented by counsel and, in fact, counsel for the putative father drafted the conditional

consent that could not be effective under Ohio law. *See In re Adoption of Ridenour*, 61 Ohio St. 3d 319, 574 N.E. 2d 1055 (1991). The putative father certainly could have objected if that was his intention.

The Ohio Supreme Court fully described why a putative father must object. The Court stated:

> In balancing the rights of a putative father and the state's interest in protecting the welfare of children, the legislature has enacted a statutory scheme where putative fathers are given the right to contest an adoption by filing an objection with the appropriate authority. In the absence of the objection required under R.C. 3107.07(B), a court lacks any indication of the putative father's full commitment to the responsibilities of parenthood. Where a putative father fails to demonstrate such a commitment, the state should not be compelled to listen to his opinion of where the child's best interests lie.

In re Adoption of Zschach, 75 Ohio St. 3d at 651 (citing *Lehr v. Robertson*, 463 U.S. 248, 262 (1983)). The Ohio Supreme Court did not accept Petitioner's contention that his conditional consent suffices as the objection specifically required under R.C. § 3107.07(B). *Id.* The Court further noted that Petitioner's motion for relief from judgment does not constitute an objection as contemplated by the statute. *Id.* at n. 1.

Strict interpretation of the Ohio statute is appropriate. As the Ohio Supreme Court recognized:

> While strict adherence to the procedural mandates of R.C. § 3107.07(B) might appear unfair in a given case, the state's interest in facilitating the adoption of children and having the adoption proceeding completed expeditiously justifies such a rigid application.

Id. at 652.

Petitioner asserts that if a specific document or objection is necessary, then the State must give him adequate notice of that fact. Pet. Brief at 20. The statute itself puts Petitioner on notice of the requirement of an objection. In *Lehr v. Robertson*, 463 U.S. 248 (1983), a putative father failed to mail a postcard to the putative father registry which would have guaranteed that he would receive notice of adoption proceedings. This Court found, "[t]he possibility that he may have failed to do so because of his ignorance of the law cannot be a sufficient reason for criticizing the law itself." *Id.* at 264.

II.

THE OHIO SUPREME COURT PROPERLY HELD THAT PETITIONER HAD SUFFICIENT NOTICE OF THE ADOPTION.

Petitioner was on actual notice of the adoption proceedings. He personally appeared to offer his conditional consent. He received notice of the final hearing scheduled for October 4, 1993 which was continued at the birth mother's request. At this point in time, the putative father and birth mother were reflecting a united front against Respondent. Petitioner filed, through counsel, a motion for relief from judgment which was denied by the trial court on March 2, 1994. He participated throughout the appellate process.

The Ohio Supreme Court correctly held:

> The procedures currently in place under Ohio law adequately protect a biological father's constitutionally protected right. If a biological father undertakes any of the actions set forth in R.C. 3107.06(F)(1) through (3), he may file an objection to the adoption, thereby making his consent necessary under R.C. 3107.06. If such an objection is made, the court may enter a decree of adoption *only* upon finding, after proper notice and hearing, that (1) the putative father is not the father of the minor, or (2) that he has willfully abandoned or failed to care for and support the minor, or (3) that he abandoned the mother of the minor during pregnancy and up to the time of her surrender of the child or its placement in the home of the petitioner, whichever occurs first. R.C. 3107.07(B). If the objection is not made after proper notice, the putative father's consent becomes unnecessary. *Id.*

Id. at 653-54.

Petitioner's claims are analogous to those set forth in *Lehr v. Robertson*, *supra*. In *Lehr*, a putative father failed to mail a postcard to the putative father registry and therefore forfeited his right to have notice of adoption proceedings for his alleged child. *Id.* As Petitioner correctly notes, this Court found that if an unwed father demonstrates a "full commitment" to the responsibilities of parenthood then his interest in contact with the child requires protection under the Due Process Clause. *Id.* at 261. However, Petitioner neglects to mention that this Court

also found in *Lehr* that, in failing to mail his postcard to the putative father registry, the putative father failed to demonstrate a "full commitment" to the responsibilities of parenthood. The Court concluded, "[i]f he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie." *Id.* at 262. The Court found that notice of the adoption was not necessary. *Id.* at 265.

Similarly, Petitioner did not demonstrate a full commitment to the adopted child. Petitioner saw the child only occasionally and in fact demonstrated a commitment only to visit the child, not to parenthood. In *Lehr*, this Court found that a putative father did not demonstrate a full commitment when he, "had never shouldered any significant responsibility with respect to the daily supervision, education, protection, or care of the child." *Id.* at 267 (quoting *Quilloin v. Walcott*, 434 U.S. 246, 256 (1978)).

The child was never in Petitioner's daily custodial care and he failed to provide the indicia of full commitment to the responsibilities of parenthood by objecting to the adoption. The Ohio Supreme Court found, "in the absence of the objection required under R.C. section 3107.07(B), a court lacks any indication of the putative father's full commitment to the responsibilities of parenthood." *In Re Adoption of Zschach*, 75 Ohio St. 3d at 651.

Notice to Petitioner was not necessary. Even assuming it was necessary, Petitioner was on actual notice and he failed to object.

III.

EQUAL PROTECTION CONCERNS ARE NOT RAISED WHEN A PUTATIVE FATHER IS TREATED DIFFERENTLY THAN A BIRTH MOTHER.

The key flaw in Petitioner's final argument is again his failure to recognize his own status as a putative father. The law of Ohio does not treat similarly situated persons differently. Rather, the custodial birth mother is entitled to certain rights and a putative father, because of the uncertain nature of his relationship, is entitled to other rights. If Petitioner had merely objected to the adoption, his failure to consent would be of legal consequence. Because he did not, consent is no longer an issue.

Moreover, the cases cited by Petitioner do not support his claim. In *Quilloin v. Walcott*, 434 U.S. at 256 (1978), this Court found that a Georgia statute that always required a mother's consent to the adoption of a child born out of wedlock, but only required the father's consent if he had legitimated the child, did not violate the Equal Protection Clause because the father had not shouldered significant responsibility for the daily supervision, education, protection or care of the child. This Court reached the same conclusion in *Lehr v. Robertson, supra.*

Moreover, *Caban v. Mohammed*, 441 U.S. 380 (1979) is clearly distinguishable. *Caban* turned on the fact that the mother and father were, in fact, similarly situated. The father had admitted paternity and participated in the rearing of the children. However, even in *Caban*, this Court made it clear that if the father had not "come forward to participate in the rearing of this child, nothing in the Equal Protection Clause [would] preclude[ ] the State from withholding from him the privilege of vetoing the adoption of that child." *Id.* at 392; *Lehr* 463 U.S. at 267. This Court concluded in *Lehr*, "[i]f one parent has an

established custodial relationship with the child and the other parent has either abandoned or never established a relationship, the Equal Protection Clause does not prevent a State from according the two parents different legal rights." 463 U.S. at 267-68. None of the cases cited by Petitioner prevent Ohio from treating an alleged parent who had not accepted the full responsibilities of parenthood differently from a birth parent who had custody of the child.

CONCLUSION

Ohio law requires a putative father to object to an adoption in order to preserve his right to withhold consent. Petitioner failed to do so. He cannot now attempt to disrupt a successful adoption in light of his own failure to act. Strict adherence to these principles is important to maintain the state's interest in facilitating the adoption of children and in order to insure that adoptions are completed expeditiously.

Any unequal treatment Petitioner received is due directly to the fact that he is merely a putative father who failed to object and demonstrate a commitment to the child. Ohio is justified in treating custodial birth parents differently than putative or alleged parents who have never shouldered the full responsibility of parenthood.

The simple fact remains that this is a matter in which the Ohio Supreme Court properly applied Ohio law. This Petition does not warrant review by the United States Supreme Court.

For the foregoing reasons, Petitioner's petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A — JUDGMENT OF THE PROBATE COURT OF FAIRFIELD COUNTY, OHIO FILED AUGUST 30, 1993

PROBATE COURT OF FAIRFIELD COUNTY, OHIO

CASE NO. 53261

IN THE MATTER OF THE ADOPTION OF

GLENNOEL GRETCHEN REAH ZSCHACH

JUDGMENT ENTRY

This matter came on for review by the court on a motion for summary judgment filed by the petitioner, Marylou Zschach and a motion for summary judgment filed by Nan Barnebey and the memorandum of Stephen Johnson. The court also had before it a motion to strike the affidavit of Viola Fisher filed on July 26, 1993 and a motion to dismiss the motion for summary judgment filed by Nan Barnebey on July 15, 1993.

The court has reviewed both motions for summary judgment, as well as the motion to strike, the motion to dismiss the summary judgment motion of Nan Barnebey and all supporting documents and the court rules as follows: The motion to strike the affidavit of Viola Fisher is denied as is the motion to dismiss the summary judgment motion of Nan Barnebey. The court has considered both motions for summary judgment on the merits and the court finds no evidence to support the allegations made by Nan Barnebey of fraud, misrepresentation and undue influence.

Since no evidence has been produced to support the allegations of Nan Barnebey and since evidence has been

produced to show the consent of Nan Barnebey on November 24, 1992 before a Judge was made voluntarily, with full knowledge of the circumstances, with the aid of legal counsel and with her specific response that she did not want visitation, the court does grant the motion for summary judgment filed by Marylou Zschach. The motion for summary judgment by Nan Barnebey is denied.

s/ S. Farrell Jackson
JUDGE

Copies: Atty. James C. Aranda
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